SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	8
Statement of the Case	8
How Federal Questions Are Presented	10
Reasons for Granting the Writ	25
Conclusion	43

INDEX TO APPENDICES

Appendix A. Memorandum Decision to the Honorable Tom Raum, Judge of the District Court, Sedgwick County, Kansas	1
Appendix B. Opinion and Judgment of the Supreme Court of Kansas	16
Appendix C. Constitutional and Statutory Provisions Involved	34

TABLE OF AUTHORITIES CITED

Cases — Page

A Book etc. v. Attorney General of Massachusetts, 383 U.S. 413 ..... 28, 29, 36, 37, 38
Baggett v. Bullitt, 377 U.S. 360 42
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 ..... 33, 34
Cole v. Arkansas, 333 U.S. 196 39
DeJonge v. Oregon, 299 U.S. 353 39
Dickinson v. United States, 346 U.S. 389 37
Dombrowski v. Pfister, 380 U.S. 479 42
Freedman v. Maryland, 380 U.S. 51 31
Garner v. Louisiana, 368 U.S. 157 31
Giaccio v. Pennsylvania, 382 U.S. 399 42
Grosjean v. American Press Co., 297 U.S. 233 34
Grove Press, Inc. v. Gerstein, 378 U.S. 577 ..... 28, 37
Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 41
J. C. Nichols Co. v. Meredith, 192 Kan. 648, 391 P. 2d 136 35
Jacobellis v. Ohio, 378 U.S. 184 ..... 4, 19, 26, 28, 29, 35, 36, 37, 40
Kingsley Books, Inc. v. Brown, 354 U.S. 436 ..... 33, 34
Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 41
Manual Enterprises, Inc. v. Day, 370 U.S. 478 33
Marcus v. Search Warrants of Property, 367 U.S. 717 ..... 33, 35
Musser v. Utah, 333 U.S. 95 41
N.A.A.C.P. v. Button, 371 U.S. 415 42

Page

New York Times Co. v. Sullivan, 376 U.S. 254 ..31, 32

Quantity of Copies of Books v. Kansas, 378 U.S. 205 .....22, 35

Roth v. United States, 354 U.S. 476 28

Roth v. United States, 378 U.S. 196 .....19, 28

Smith v. California, 361 U.S. 147 .....33, 35, 42

Speiser v. Randall, 357 U.S. 513 .....31, 33

State v. A Quantity of Copies of Books, 191 Kan. 13, 379 P. 2d 254 .....22, 37, 38

Superior Films, Inc. v. Dept. of Ed. [Commercial Pics. Corp. v. Regents], 346 U.S. 587 41

Taylor v. Louisiana, 370 U.S. 154 31

Thompson v. Louisville, 362 U.S. 199 31

Times Film Corp. v. Chicago, 355 U.S. 35 42

Times Film Corp. v. Chicago, 365 U.S. 43 34

Tot v. United States, 319 U.S. 463 32

Tralins v. Gerstein, 378 U.S. 576 .....28, 37

United States v. Klaw, 350 F. 2d 155 32

United States v. Romano, 382 U.S. 136 32

Statutes

General Statutes of Kansas, G.S. 1961, Supp. 21-1102 .....2, 8, 10

General Statutes of Kansas, G.S. 1961, Supp. 21-1102a 8, 41

General Statutes of Kansas, G.S. 1961, Supp. 21-1102b 10, 41

General Statutes of Kansas, G.S. 1961, Supp. 21-1102c, L. 1961, ch. 186, Sec. 1 8

Page

General Statutes of Kansas, G.S. 1961, Supp. 21-1102c, L. 1961, ch. 186, Sec. 2 8

General Statutes of Kansas, G.S. 1961, Supp. 21-1102c, L. 1961, ch. 186, Sec. 4 8

United States Code, Title 28, Sec. 1257(3) 2

United States Constitution, First Amendment ....4, 5 ....6, 7, 8, 11, 23, 24, 26, 28, 31, 32, 36, 37, 38, 39, 40

United States Constitution, Fourth Amendment 8, 11, 24

United States Constitution, Seventh Amendment .. 8

United States Constitution, Fourteenth Amendment .....4, 5, 6, 7, 8, 10, 11, 23, 24 .....26, 28, 31, 32, 33, 36, 37, 39, 40

Textbooks

38 Minnesota Law Review, pp. 295, 332 42

45 Minnesota Law Review (1960), pp. 5, 114, 120 .. 36

IN THE

Supreme Court of the United States

October Term, 1966
No. .....

A QUANTITY OF COPIES OF BOOKS, FRANCIS G. VATER and JOE RECTOR, JR., Co-Partners, dba Rector's Book Store, Wichita, Kansas,

Petitioners,

vs.

STATE OF KANSAS,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas, entered in the above-entitled case on July 14, 1966.

Opinions Below.

The Memorandum Decision of the Hohorable Tom Raum, a Judge of the District Court of Sedgwick County, Kansas (R. 29-36) is unreported and is printed in Appendix A hereto. The opinion of the Supreme Court of the State of Kansas (R. 43-65), printed in Appendix B hereto, is reported in 197 Kan. 306, 416 P. 2d 703.

Jurisdiction.

The judgment of the Supreme Court of the State of Kansas (R. 43-65) was entered on July 14, 1966 (R. 43). A due and timely motion for rehearing (R. 66-82) was denied on September 16, 1966 (R. 83). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

Pursuant to the provisions of the General Statutes of Kansas [G.S. 1961, Supp. 21-1102 *et seq.*], an Information was filed by the State seeking an order granting a search warrant authorizing the seizure and ultimate destruction of eleven books named in the Information alleged to be held for sale in a book store located in Wichita, Kansas. It was alleged that the said books were "lewd, lascivious and obscene".

The owners of the book store, the petitioners here, intervened in the proceedings against the books, and moved to dismiss the proceedings upon the grounds generally that the state obscenity statutes, on their face and as construed and applied by the Information, violated the free speech and press and due process provisions of the State and Federal Constitutions. The said petitioners also moved for a jury trial of the issues of obscenity, basing the said motion also upon the free speech and press and due process provisions of the State and Federal Constitutions. The aforesaid motions were denied.

At the trial, the State offered the books into evidence and rested. Motions to dismiss upon legal and constitutional grounds were denied.

Petitioners put into evidence oral and documentary testimony through an expert witness and comparison books, establishing that the books herein, measured by customary limits of candor and freedom of expression, were clearly not obscene, that is, that the books named in the Information did not exceed contemporary community standards in the depiction of sex, nudity or excretion; did not appeal to a prurient interest; and were not utterly without redeeming social importance.

The State offered no rebuttal.

The trial judge read the books named in the Information. The trial court also read all the comparison books which petitioners had offered into evidence, a number of which had been held by the courts to be constitutionally protected, and all of which were generally accepted in the State and Nation, and were more candid in language and description and in theme than the books named in the Information.

The trial judge made explicit findings holding that the books involved herein did not go beyond contemporary community standards; did not appeal to prurient interest; and had social importance. The trial judge held that the books were not obscene and entitled to constitutional protection. Accordingly, a judgment was entered decreeing that the books named in the Information were not in violation of the state obscenity statutes; that the prayer for the issuance of a search warrant should be denied; and that the action should be dismissed with judgment for petitioners.

The court below, on appeal by the State, in disregard of the uncontroverted record and the findings and judgment of the trial judge, held that it was free to deny constitutional protection to the books named in the In-

formation. The holding was premised upon the view that this Court in *Jacobellis* had authorized appellate courts to exercise an "independent constitutional judgment" regardless of the undisputed record. Without evidence therefore to support such a conclusion, the court below held that the books herein violated the state obscenity statutes and were without constitutional protection. In addition, the court below relied upon this Court's decisions in *Ginzburg* and *Mishkin*, although said decisions were rendered after the trial herein and despite the fact that no charge of "pandering" was ever made or proved against the petitioners herein, the booksellers.

As a result, the judgment denying a warrant of seizure and destruction of the books herein was reversed, the court below at the same time affirming, upon petitioners' cross-appeal, the rulings of the trial judge denying a jury trial and upholding the constitutional validity of the state obscenity statutes on their face.

The questions presented, as a result of the aforesaid, are as follows:

1. Whether the state obscenity statutes, on their face and as construed and applied to authorize the destruction of the eleven books named in the Information upon the ground that said books are obscene and hard core pornography, abridge the exercise of freedoms of speech and press, including petitioners' exercise thereof, and arbitrarily deprive petitioners of their liberty and property without due process of law, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the state obscenity statutes, as construed and applied to authorize the seizure and destruction of the eleven books named in the Information, without proof by the State that said books go substantially beyond contemoprary community standards in the description or representation of matters pertaining to sex, nudity or excretion; and without proof, in addition, that said books appeal to the prurient interest of the average person and are utterly without redeeming social importance, abridge petitioners' exercise of freedoms of speech and press and arbitrarily deprive petitioners of liberty and property without due process of law, in violation of the free speech and press and the due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether the state obscenity statutes, as construed and applied to authorize the seizure and destruction of the eleven books named in the Information, without any evidence in the record establishing the alleged obscenity of the books, the uncontroverted record showing that the writings are entitled to constitutional protection, abridge petitioners' exercise of freedoms of speech and press and arbitrarily deprive petitioners of liberty and property without due process of law, in violation of the free speech and press and the due process provisions of the First and Fourteenth Amenements to the Constitution of the United States.

4. Whether the state obscenity statutes, on their face and as construed and applied, by reason of the absence of a provision for a jury trial of the essential issues thereunder, and by reason of a denial of a jury trial in the case herein, despite petitioners' requests duly made, render the statutes unconstitutional because

the statutes, on their face and as so construed and applied, abridge petitioners' exercise of freedoms of speech and press and arbitrarily deprive petitioners of their liberty and property without due process of law, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

5. Whether the state obscenity statutes, as construed and applied by the court below to authorize the said Court to disregard the uncontroverted record and judgment of the trial court establishing and holding that the books named in the Information do not exceed contemporary community standards in the description or representation of matters pertaining to sex, nudity or excretion; do not appeal to the prurient interest; are not utterly without redeeming social importance and are entitled to constitutional protection, and to authorize, without evidence, a decree that said books should be suppressed as obscene and hard core pornography as a matter of "independent constitutional judgment", arbitrarily and capriciously abridge petitioners' exercise of freedoms of speech and press, deprive petitioners of liberty and property without due process of law and deny petitioners the equal protection of the laws, contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the Constitution of the United States.

6. Whether the state obscenity statutes, as construed and applied by the court below to justify the suppression of the eleven books named in the Information as obscene because of their "packaging" and because of the "motives" of the publishers, who were not on trial nor involved in the proceedings, and without any charge in

the Information or proof in support thereof of any unlawful motives, intent or pandering on the part of any person, arbitrarily deprive petitioners of their liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the Constitution of the United States.

7. Whether the state obscenity statutes, as construed and applied by the court below to authorize the retroactive application of the "pandering" decisions of this Court in *Ginzburg* and *Mishkin*, which were not in existence at the time the case herein was tried, and where the case herein was tried without any charge, proof or theory of "pandering", arbitrarily deprive petitioners of their liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the Constitution of the United States.

8. Whether the state obscenity statutes, on their face and as construed and applied by the court below, by reason of the vagueness and overbreadth of the provisions of the said statutes and the lack of ascertainable standards of guilt, abridge the exercise of freedoms of speech and press, constitute a prior restraint on the circulation of books, including the books herein, and deprive petitioners of their liberty and property without due process of law, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Seventh and Fourteenth Amendments to the Constitution of the United States, and the pertinent provisions of the General Statutes of Kansas [G.S. 1961, Supp. 21-1102, 21-1102a, 21-1102c, L.1961, ch. 186, §§1, 2 and 4, June 30] are printed hereto as Appendix C.

Statement of the Case.

On July 24, 1964, the then Attorney General of the State of Kansas, William M. Ferguson, filed a verified Information in the District Court of Sedgwick County, Kansas (R. 3-4). The caption of the Information was entitled in the name of the State as plaintiff v. A Quantity of Books described as "lewd, lascivious and obscene" and titled *"Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden, Flesh Avenger"*.

The Information alleged that the said Attorney General had been informed that on July 23, 1964 and prior thereto, the aforementioned paperback books were possessed or kept for sale and distribution within a place of business known as Rector's Book Store, 133 North Broadway, Wichita, Kansas (R. 4). The Information further alleged that the said books were "in their entirety obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books", all allegedly in violation of law (R. 4). It was alleged in the Information that copies of each of the said books had been purchased at said

book store on three different days prior to the filing of the Information (R. 4).

On the same day, July 24, 1964, the Honorable Howard C. Kline, a Judge of the District Court of Sedgwick County, Kansas, made an order requiring any person having any interest in said books to appear before the Court on the 31st day of July, 1964 to show cause why a warrant should not be issued to the Sheriff of Sedgwick County, Kansas in accordance with the prayer of the Information (R. 4). The order of Judge Kline noted that the Information had been filed with the Court; that the keeping of "lewd, lascivious and obscene books" for sale would be in violation of the Kansas statutes; that the Kansas statutes provided for the seizure of lewd, lascivious and obscene books upon warrant issued from the Court and, if found by the Court to be possessed in violation of law, "may be destroyed by burning or otherwise at the direction of this Court"; and that the Court had "fully read and examined" three of the books submitted to him and "examined" the remainder of the books, and found there was "reason to believe" that said books were obscene and being kept for sale at Rector's Book Store in Wichita, Kansas in violation of the Kansas statutes (R. 4).

The order of the said Judge Kline was served by the Sheriff of Sedgwick County, Kansas on July 25, 1964 by delivery of a copy of the said order to an assistant manager of the said Rector's Book Store in Wichita, Kansas (R. 5).

How Federal Questions Are Presented.

(a) Following the intervention of the petitioners Francis G. Vater and Joe Rector, Jr., Co-partners, dba Rector's Book Store, Wichita, Kansas, a Motion to Quash and Dismiss the Proceedings was filed on July 31, 1964 on behalf of the said petitioners and the petitioner Books (R. 5-7). The grounds of the Motion to Quash and to Dismiss were generally that the statute, Chapter 186, Laws of Kansas, 1961 [G.S. 1961 Supp. 21-1102, *et seq.*], on its face and as construed and applied to the books named in the Information, violated the Constitution of the United States and the Constitution of the State of Kansas; that said statute, on its face and as construed and applied to the said books, arbitrarily deprived petitioners of their property without due process of law, denied petitioners the equal protection of the laws and freedoms of speech and press, all contrary to the provisions of the Fourteenth Amendment to the United States Constitution; that the books involved were not obscene and were entitled to constitutional protection; that Section 1 of said statute, on its face and as construed and applied to the said books, was too broad and too vague and did not provide a legally recognized standard for the protection of books and freedoms of speech nd press; that Section 1, subparagraph b of said law, on its face and as construed and applied to the named books, for similar reasons failed to provide an adequate and legal standard capable of determining whether the books were in fact obscene or constitutionally protected and, therefore, abridged freedoms of speech and press and denied petitioners the equal protection of the laws and deprived petitioners of their property without due process of law;

that Section 4 of said statute, on its face and as construed and applied, purported to permit the seizure of books without affording the interested parties an opportunity to a fair due process hearing; that said Act, on its face and as construed and applied, authorizing and requiring the seizure of the said books, was arbitrary and unreasonable, and deprived petitioners of their right to be secure against unreasonable searches and seizures secured by the Fourth and Fourteenth Amendments to the United States Constitution; and that for all of the aforesaid reasons, the Court lacked jurisdiction over the subject matter of the action, and the Information failed to state a claim upon which relief could be granted (R. 5-7, 9).

Petitioners, on the same day, also moved for a jury trial of the issues presented by the Information and the Order to Show Cause (R. 7, 9). The grounds of said motion were generally, that only by a jury trial of the essential issues could petitioners be guaranteed the freedoms of speech and press through due process of law and equal protection of the laws as provided by the First and Fourteenth Amendments to the United States Constitution (R. 7, 9).

The aforesaid motions to quash and to dismiss and for a jury trial, and renewals thereof, were denied (R. 7-8, 9-10, 11).

At a pre-trial conference held on November 23, 1964, it was stipulated by counsel for the respective parties, and ordered, that (1) the eleven titled names in the Information (Exhibits "A" through "K") were purchased from open counters or rack displays where they were offered for sale to the general public at petitioners' book store located at 133 North Broadway, Wichita,

Kansas; (2) that the said book store in the course of a year's business handles and offers for sale to the general public large quantities of written and printed publications of all kinds dealing with every conceivable subject; (3) that such written and printed publications are supplied by established publishing houses and comprise daily and weekly newspapers, magazines, books and prints, containing material concerning religion, philosophy, science, literature, art and all subjects relating to ideas and the graphic arts of interest to readers and students of printed words and ideas of the graphic arts; (4) that everyone patronizing the said book store has a free choice in the purchase of the printed matter for sale at the store; and (5) that the proprietors of the said book store had not read the eleven titles involved in the action and did not read nor presume to read as a matter of course the printed material offered for sale in said store (R. 10-11).

It was also stipulated by counsel, and ordered, that at the forthcoming hearing, no witnesses would be called on behalf of the State, and the only evidence which would be introduced on behalf of the State would be the titles identified as Exhibits "A" through "K" (R, 11).

It was also stipulated by counsel, and ordered, that the only witness who would be called on behalf of petitioners would be Robert Bruce Cutler, and that the evidence which would be introduced on behalf of petitioners would consist of the following books submitted to the Court: (1) *Eternal Fire* by Calder Willingham; (2) *City of Night* by *John Rechy;* (3) *Naked Lunch* by William Burroughs; (4) *Tropic of Capricorn* by Henry Miller; (5) *Lady Chatterley's Lover* by D. H.

Lawrence; (6) *Another Country* by James Baldwin, (7) *Fanny Hill* by John Cleland; (8) *The Carpetbaggers* by Harold Robbins; (9) *Tropic of Cancer* by *Henry Miller*; and (10) *My Life and Loves* by Frank Harris.

(b) The hearing commenced on December 10, 1964. The State introduced into evidence Exhibits "A" through "K". Thereupon, the State rested (R. 11).

Petitioners moved to dismiss the proceedings upon the grounds that the State had not met its burden of proof; that the State had failed to prove the essential ingredients of the offense; that the State had failed to present any facts to establish the community standards of the State or Nation; that the State had presented no facts to establish that the books named in the Information went beyond the community standards of the Nation in the description or representation of matters pertaining to sex; and that in essence the State had presented no evidence to prove that the said books were obscene or otherwise in violation of the statute (R. 11-14).

During the course of the argument on the motion the trial court inquired of the prosecutor: "Aren't you putting me in a position where I'm setting myself up as a standard-bearer rather than producing evidence of the community acceptance of this type of material" (R. 12). The Court stated: "I'm wondering, do I have to reach out of a clear sky and say this is not acceptable by this community; it is acceptable by this community" (R. 13). Referring to possible review by appellate courts of the judgment to be rendered, the trial court stated: "I have no evidence of what the community standard is. There would be nothing for them to re-

view if I said this community accepts this sort of thing. What would the Supreme Court, any court, any appellate court, what would they review?" (R. 13). The trial court ventured the opinion that the prosecutor was asking the Court to assume a very large assignment, to wit, "setting myself out as an expert of the nation" (R. 14).

On behalf of the petitioners, there was expert testimony presented by Robert Bruce Cutler (R. 14). The expertise of the witness was not disputed by respondent in the court below. Mr. Cutler, at the time of his testimony, was an Associate Professor of English at Wichita State University. He held a Bachelor's Degree from the University of Iowa; a Master's Degree from Kansas University. He had lived in Kansas more than eight years and had been in Wichita at Wichita State University more than four (R. 14-15). He had been a member of the American Friends Service Committee, working in various projects in this country and in Central America. He was also a Fulbright Student in Italy at the University of Naples. Thereafter, he was an Instructor in the Department of English at Kansas University and, at the time of the hearing, for four years had been an Instructor, Assistant Professor and Associate Professor of English at Wichita State University (R. 15).

Mr. Cutler had been the recipient of a number of academic honors and won some literary awards (R. 15). He had published fiction, poetry and literary criticism, and one of his works, a verse play, had been given a public performance on the stage of Wichita State University. His books had been published by the University of Nebraska Press, and he was the winner of the

First Book Award from the University of Nebraska Press in 1960. He had also won a poetry award in 1964. The witness had also written book reviews for the Wichita Beacon and for the Kansas City Star on various occasions over the two years prior to his testifying at the hearing (R. 15).

The witness testified that he had read the books named in the Information. He stated that the books were all novels and that each of the books had plots, characters, motivations and themes (R. 15). The literary style of these books, the witness testified, was naturalistic. The books were premised on the view that despite individual decision, or even intention, men and women were moved to action by forces and motivations which they were largely powerless to counteract. Such motivations might come from society or from their own irrational natures (R. 16).

The witness pointed out that the novels named in the Information, Exhibits "A" through "K", made no direct reference to the male or female sex organs; that the language in the books was clearly not offensive to the community; that the language was not vulgar and that there were no four-letter Anglo-Saxon words in the writings (R. 16).

The witness testified that the type of novels herein was representative of a stratum of literature which would include such things as mystery stories, sentimental romances, self-confessional literature, all written on a very elementary level for persons with limited background and ability (R. 16).

The witness was then asked to testify concerning the comparison exhibits offered by petitioners into evidence. He stated that he was familiar with petitioners'

Exhibits 1, 2 and 4 through 10. He had read these books over the past five years (R. 16). With respect to the aforesaid comparison testimony, the expert witness testified that all of the books were available for purchase in book stores in Wichita and in the Nation as a whole, and that most of the books were available in the City Library of Wichita, and in other libraries in the United States (R. 16-19).

These comparison books had appeared on bestseller lists; had been published in both hard cover and paperbacks; and contained descriptions of sexual relationships and language of greater candor than any contained in the books offered by the State (R. 16-19). The witness testified that these comparison books which were available in libraries and book stores in Wichita and throughout the Nation dealt candidly and frankly with such themes as homosexuality, prostitution, adultery, and other related sexual themes which in description and language went far beyond the books named in the Information (R. 16-19).

The witness further testified that there were other books, both hard back and paperback, in general circulation in the Nation as a whole, and in Wichita, which contained graphic descriptions of sexual behavior exceeding in candor the sexual descriptions, portrayals and language found in the books contained in the Information (R. 19-20).

The witness included among such comparison books the books *Candy* by Southern and Hoffenberg, published by Putnam; *The Group* by Mary McCarthy, published by Harcourt and Brace in 1963; *Pretty Leslie* by Cassill, published by Simon and Shuster in hard cover in 1963 and in paperback by Bantam Books in

1964; *The Young Lovers* by Halevy, published in hard cover by Simon and Shuster in 1955 and in paperback by Dell Publishing Company in 1964; and *Nova Express* by William Burroughs.

The witness testified that the aforementioned books did not go beyond the customary limits of candor in the Nation as a whole or in Wichita in the portrayal of matters pertaining to sex and sexual behavior; that the books he had mentioned were not intended to be all-inclusive of books of this type; that it was common knowledge that within the last five years, books dealing with erotic experience, whether factual, medical or fictional, had been in common circulation in the community and in the country (R. 20).

Mr. Cutler further testified that books named in the Information, Exhibits "A" through "K", were not utterly without redeeming social importance; that the books had a social importance for persons of limited background who, like a person of more sophisticated background, would likely have an interest in erotic experience and who would be able to read and understand them. Such a person would probably be afforded an insight into that kind of experience (R. 20).

The witness concluded his direct examination by testifying that the books marked as State's Exhibits "A" through "K" did not go beyond the customary community standard of common conscience in the community of Wichita, Kansas, and in the Nation as a whole in portraying sex and sexual behavior (R. 20).

The witness also testified on cross-examination that the sexual descriptions in some of the books marked Exhibits 1, 2 and 4 through 10 have been printed in book reviews; that they are often quoted in reviews

which are given in magazines, and that those dealing with contemporary literature particularly will quote without any hesitation passages from these novels. The magazines which use such quotations would likely be those magazines which serve the general public, such as the Saturday Review, Publishers Weekly, etc. (R. 24).

Mr. Cutler further testified that petitioners' comparison Exhibits 1, 2 and 4 through 10 portrary graphically sexual relationships, both heterosexual and homosexual, of virtually every type. The characters involved in these books, which are generally accepted and circulated throughout the Nation as a whole, are of an extreme sexual prowess. The writings are complete with allusions and descriptions of sexual acts in substantial number (R. 24). These books were on open racks in the Wichita Public Library. The witness had bought *Candy* and *Nova Express* in the book department at Buck's. *The Group* he had bought at Woolworth's. *Pretty Leslie* he bought at a drug store, and Halevy's *The Young Lovers* at a different drug store. *Another Country, My Life and Loves, City of Night* and the two *Tropics* were also for sale at book and drug stores. *The Carpetbaggers* the witness had observed for sale at the Crown Drug Store. *Fanny Hill* was on sale in a book store in Park Lane (R. 25).

(c) On July 9, 1965, the Honorable Tom Raum, a Judge of the District Court of Sedgwick County, Kansas rendered his Memorandum Decision (R. 29-36; Appendix A). Judge Raum noted that no witnesses were called by the State. The only evidence introduced on behalf of respondent was the eleven books named in the Information (R. 30). The Court also noted that after the witness Robert Bruce Cutler testified as an

expert witness on behalf of petitioners and after the books, Exhibits 1, 2 and 4 through 10, had been introduced into evidence by petitioners, respondent offered no evidence in rebuttal (R. 30).

Judge Raum stated in his Memorandum Decision that he had read each of the twenty volumes introduced into evidence, comprising a total of 6,395 pages (R. 20). After a review of the applicable Kansas statute, and the constitutional provisions of the United States Constitution and the Kansas Constitution, the Court held that the Kansas statute, on its face, was adequate; that the absence of a provision in the statute of a right to a jury trial did not render the statute unconstitutional and that the procedures employed in the case, even though not contained in the statute, provided adequate safeguards against the suppression of nonobscene books (R. 31-32).

After a discussion of the standards for judging obscenity enunciated by this Court in *Roth* and *Jacobellis* (R. 32-33), Judge Raum proceeded to an analysis of the testimony of the expert witness Robert Bruce Cutler, as detailed above (R. 34-35). The trial court noted that Professor Cutler had testified that all of the books named in the Information had discernible plots and dealt with familiar fictional problems; that the books do not deal in any graphic or detailed way with sexual activities; that the language used in the books was neither vulgar nor offensive to the community and contained no four-letter Anglo-Saxon words (R. 34).

Judge Raum also noted that Professor Cutler testified that each of the books introduced by petitioners were in common circulation in the City of Wichita and in the Nation as a whole; that six of the ten books

were available in the City Library of Wichita, Kansas and available for purchase in book stores in Wichita, and that each of the books introduced by petitioners were available in other public libraries in the United States (R. 34).

The trial court also noted that Professor Cutler had testified that in his opinion none of the books introduced by petitioners went beyond the customary limits of candor in the description or representation of sex and that, in addition, other books in general circulation in the Nation as a whole, and in Wichita, contained graphic descriptions of sexual behavior which exceeded in candor the sexual descriptions and portrayals in the books named in the Information (R. 34-35).

The trial court also noted that Professor Cutler had testified that in his opinion the books named in the Information were not utterly without social importance and did not go beyond the customary community standard of common conscience in the community of Wichita, Kansas and in the Nation as a whole in portraying sex and sexual behavior (R. 35).

Judge Raum then stated in his Memorandum Decision: "This Court concurs generally in the opinions expressed by Professor Cutler." (R. 35).

Judge Raum also stated in his Memorandum Decision that three books introduced by petitioners had received judicial approval, to wit, *Lady Chatterley's Lover, Tropic of Cancer* and *Fanny Hill,* and that each of these three books went far beyond any of the books named in the Information in the description or representation of matters pertaining to sex, nudity or excretion (R. 35).

Judge Raum *found* that "each of the books introduced by the defense, all in common circulation in Wichita,

Kansas, and in the nation as a whole, go far beyond any of the books named in the Information in the description or representation of matters pertaining to sex, nudity or excretion"; "other books in common circulation in Wichita, Kansas, and in the nation as a whole, exceed in candor sexual descriptions and portrayals found in the books named in the Information"; "none of the books named in the Information contain obscene, immoral, lewd or lascivious language or descriptions, manifestly tending to the corruption of the morals of persons"; "none of the books named in the Information go substantially beyond customary limits of candor in description or representation of sex, nudity or excretion"; "to the average person, applying contemporary community standards, the dominant theme of each of the books named in the Information, when taken as a whole does not appeal to prurient interest"; "Based upon the evidence, the Court further finds that none of the books named in the Information are utterly without redeeming social importance"; "The Court further finds that the books named in the Information are, and each of them is, expression protected by the free speech and press provisions of the Federal and State Constitutions" (R. 35-36).

On July 16, 1965, judgment was entered decreeing that the books named in the Information were not in violation of the statute; that the prayer for the issuance of a warrant should be denied and that the action be dismissed and judgment granted to petitioners (R. 36-37). From this judgment, respondent prosecuted an appeal (R. 37). Thereafter, petitioners filed a Notice of Cross-Appeal from those portions of the orders and decision made by the trial court, which overruled peti-

tioners' motions to quash and to dismiss and petitioners' motion for jury trial, and which held that the statute, on its face and as construed and applied, was constitutionally valid and that the procedures employed by respondent were adequate (R. 38).

(d) The opinion and judgment of the Supreme Court of the State of Kansas, the court below, was filed on July 14, 1966 (R. 43-65). The Court rejected the argument of petitioners "that the books are not obscene and are within the protection of the First and Fourteenth Amendments to the Constitution of the United States" (R. 48).

The court below decided that the eleven books involved were unlawful under the statute and no different from the books found to be "hard core pornography" by the court below in *State v. A Quantity of Copies of Books,* 191 Kan. 13, 379 P. 2d 254 (1963) [reversed, *Quantity of Copies of Books v. Kansas,* 378 U.S. 205] (R. 54-55). The Court added that if the alleged obscene nature of the books "be deemed doubtful" (R. 56), still the doubt would have to be resolved against the petitioners in the light of this Court's decisions in *Ginzburg, Mishkin* and *Memoirs* (R. 56-59). "We recognize the intervenors are not the publishers and are not on trial; it is the books which are on trial. They brazenly proclaim the motive in their creation and exploitation" (R. 59).

With respect to the comparison books introduced into evidence by petitioners, the court below held that the said books "could be considered to have some redeeming social values to compensate for the strong sex, and this is a distinguishing feature" (R. 60).

As to the cross-appeal by petitioners, the court below held that the statutes involved, on their face and as applied, were not unconstitutional; that petitioners were not entitled to a trial by jury, "none having existed at common law" (R. 60); and that the statutory procedures for the seizure of books alleged to be unlawful under the obscenity statutes were free from constitutional infirmity (R. 60-62).

The court below therefore held that the orders of the trial court overruling the motion to quash and dismiss and denying a jury trial were affirmed. The judgment that the eleven books were not obscene was reversed with directions to proceed in harmony with the opinion (R. 62-63).

(e) Petitioners duly filed a timely motion for rehearing (R. 66-82). The grounds of the aforesaid motion, among others, was that the Kansas obscenity statutes, as construed and applied by the Kansas Supreme Court to the eleven books involved herein, abridge the exercise of freedoms of speech and press and deprive petitioners of their liberty and property without due process of law, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution (R. 79); that the holding of the Kansas Supreme Court that the findings made by the trial court, based on an uncontradicted record that the books involved were not obscene, could be disregarded and that said books could be independently declared obscene by the Kansas Supreme Court as a matter of independent constitutional judgment, violated the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution (R. 79), that the ruling of the court below that the books

could be declared obscene, despite the absence of any proof by the prosecution that the books substantially exceeded contemporary community standards, or appealed to a prurient interest, or were utterly without redeeming social importance, also violated the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution (R. 80); that reliance upon the decisions in *Ginzburg* and *Mishkin,* which had not been decided by this Court at the time the case was tried, and where no charge of pandering had ever been made by the State and no proof adduced in support of such a charge against the booksellers, constituted an arbitrary deprivation of petitioners' liberty and property without due process of law and abridged the exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution (R. 80); that the Kansas statutes, on their face and as construed, both with respect to the exercise of freedoms of speech and press and freedom from unlawful search and seizure, violated the First, Fourth and Fourteenth Amendments to the United States Constitution (R. 81); and that the absence in the statutes of a right to jury trial, and the refusal to grant petitioners' request for a jury trial and jury determination on the issue of obscenity, violated the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution (R. 81).

The aforesaid motion for rehearing aas denied, without opinion, on September 16, 1966 (R. 83). On September 28, 1966, Chief Justice Robert T. Price of the Supreme Court of Kansas made his order granting a stay of the execution of the judgment of the court

below for a period of thirty days. On October 25, 1966, Mr. Justice White granted a further stay of the mandate of the court below pending the timely filing and disposition of a petition for a writ of certiorari.

Reasons for Granting the Writ.

This was an *in rem* proceeding. The State herein declined to grant the petitioners a jury trial on the issue of the alleged obscenity of the books purchased by state officials at petitioners' book store. At the trial, the State relied solely on the books and produced no other evidence of any nature. Petitioners were required to assume the burden of proving that each of the books do not substantially exceed contemporary community standards, in the State or the Nation as a whole, in the depiction of sex, nudity or excretion; do not appeal to a shameful or morbid interest in sex; and are not utterly without redeeming social importance.

Petitioners met the aforesaid burden. They produced an expert witness. They produced comparison books and other documentary evidence. They showed undisputedly that, measured by customary freedom of expression; measured by what is accepted, both in book shops and libraries in Wichita, Kansas as well as the Nation; and measured by books and other writings which have received judicial approval of all courts, including this Court, the books named in the Information were clearly entitled to constitutional protection.

The trial judge, the trier of the facts, read all the comparison books that were offered in evidence; read the books charged in the Information; considered the undisputed record presented to him; and found that each of the books herein do not go beyond contem-

porary community standards, do not appeal to a prurient interest, and have social importance.

Thus, there was presented to the court below a record barren of any evidence that the books herein were obscene; an undisputed record that the said books were not obscene, supported by expert testimony and other documentary evidence; the concurrence of the trial judge himself with the views of the expert; and a determination by the trier of the facts that the books, in the light of the provisions of the Constitution and the decisions of this Court, were entitled to the protective guarantees of the First and Fourteenth Amendments to the United States Constitution.

The court below construed the admonition of this Court in *Jacobellis* and *Memoirs* for appellate courts to exercise an "independent constitutional judgment" as meaning that an appellate court could disregard entirely a record barren of proof of obscenity and an undisputed record showing nonobscenity of the writings and make its own finding, without proof, that the books were obscene. Thus, a rule of law promulgated by this Court to ensure protection for the freedom of expression guaranteed by the provisions of the First Amendment, was turned into an added device for the suppression of speech and press.

In addition, the "pandering" decisions of this Court in *Ginzburg* and *Mishkin*, rendered after the trial of the cause herein, were relied upon by the court below to justify suppression of the books involved in this case, although no charge or proof of "pandering" was ever made at the trial level and although the petitioners involved are only the booksellers who, by stipulation of counsel of the State, were admittedly engaged in a

lawful business, and where the books were concededly purchased by officials of the State without the slightest claim of pandering or other unlawful related activity on the part of the petitioners. The court below pointedly stated: "We recognize the intervenors are not the publishers and are not on trial; it is the books which are on trial" (R. 59).

The trial of books in the United States has always been a matter of particular concern to this Court in the light of the provisions of the fundamental law and the postulates which govern the workings of a self-governing society. If there is to be a trial of books in America, clearly such books should not be suppressed when, after trial, on an undisputed record, the trier of the facts decides that the books are entitled to enter the market place of ideas free from governmental infringement. If appellate courts may direct the suppression and burning of books in total disregard of a record which establishes that the books are not obscene and without any proof to the contrary, all under the label of "independent constitutional judgment", then it is submitted the broad historical and societal aims and objectives embodied in the free speech and press provisions of the Constitution are undermined.

The case herein bristles with constitutional infirmities. In the constitutional sense, the books involved are not obscene. The failure on the part of the State to prove such obscenity was violative of the due process and free speech provisions of the Constitution. The failure to afford petitioners a jury trial of the issues of obscenity did violence to the said provisions of the fundamental law. The state obscenity statutes, on their face and as construed and applied herein to author-

ize the suppression of these books, run counter to the guarantees of the First and Fourteenth Amendments. The action of the court below in authorizing the suppression of the books herein is plainly contrary to the free speech and press, due process and equal protection of the laws provisions of the First and Fourteenth Amendments. Petitioners discuss these issues hereinafter.

2. In the first place, it is submitted that the books herein involved are neither in fact nor in law obscene, and that they are entitled to constitutional protection under the provisions of the First and Fourteenth Amendments. The standards for judging obscenity have been enunciated by a series of decisions of this Court, which demonstrate that the books herein are within the broad area of constitutional protection. *Roth v. United States,* 354 U.S. 476; *Jacobellis v. Ohio,* 378 U.S. 184; *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Tralins v. Gerstein,* 378 U.S. 576; *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413.

A distillation of the aforesaid decisions leads to the conclusion that before constitutional protection may be denied to a writing, the following elements must coalesce and be established: (1) the writing, in the first instance, must go substantially beyond the customary limits of candor, in the Nation as a whole, in the description of matters pertaining to sex, nudity or excretion; and (2) the writing must appeal to a prurient interest in sex, *i.e.*, a shameful or morbid interest in sex; and (3) the writing must be utterly without redeeming social value. Moreover, the constitutional status of a book cannot be made to turn on a weighing of its social importance against its prurient appeal; or,

in other words, the "three federal constitutional criteria" must be applied independently. *Jacobellis v. Ohio,* 378 U.S. 184; *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413.

In the light of the record made in the trial court and in view of the standards enunciated by this Court, the books herein can be neither deemed obscene nor hard core pornography; they must be held entitled, it is submitted, to constitutional protection.

On the issue of contemporary community standards, the State offered no evidence, either on direct or rebuttal, to support a charge that the books herein go beyond the limits of candor and customary freedom of expression. On the other hand, the undisputed evidence offered by petitioners' expert demonstrated that neither in language nor in theme do the books herein approach the candor of description nor the explicitness of language found in the writings of noted authors generally accepted and widely read by the public.

The trial judge found that the descriptions of sexual behavior in the books herein do not go beyond the candor of description found in the best sellers contained in the book shops and libraries which are widely accepted and tolerated by the community generally. The trial judge found that none of the books named in the Information go substantially beyond customary limits of candor in description or representation of matters pertaining to sex, nudity or excretion. In addition, the trial judge found that each of the comparison books introduced by the defense, as well as other books in common circulation in Wichita, Kansas and in the Nation as a whole, go far beyond any of the books named in the Information in the candor of sexual descriptions

and portrayals and representations of matters pertaining to sex, nudity or excretion.

Thus, the undisputed record established that the books herein involved do not exceed contemporary community standards.

The State made no attempt to prove, on direct or by rebuttal, that the books herein appeal to the prurient interest of the average person. Petitioners' expert witness testified that the books herein do not appeal to a morbid or shameful interest in sex, but rather to a normal and candid interest of the average person in books dealing with the naturalistic plots and themes contained in the writings herein. Petitioners' expert testified that the books herein are similar to a stratum of literature, which include such material as mystery stories, sentimental romances, self-confessional literature, all written on a very elementary level which individuals with limited background would be able to read and understand; that such persons would receive insights and accept candidly the plots, themes and discussions of sex contained in the books named in the Information (R. 16, 20, 26).

The trial judge found that "to the average person, applying contemporary community standards, the dominant theme of each of the books named in the Information, when taken as a whole, does not appeal to prurient interest" (R. 35).

The State offered no proof, on direct or rebuttal, to show that the books named in the Information were utterly without redeeming social importance. The evidence offered by petitioners through expert testimony established that the writings have a social importance

for the vast number of persons whose backgrounds in art and literature are limited (R. 20).

The trial judge found that none of the books named in the Information are utterly without redeeming social importance (R. 36).

Thus, so far as the uncontroverted record in the case herein is involved, and measured by the standards for judging obscenity enunciated by this Court in the light of the free speech and press requirements of the First and Fourteenth Amendments, the books herein are entitled to constitutional protection.

3. In the second place, it should be noted that the State made no attempt to establish the essential elements of the charge made against the books herein. The State made no attempt to prove that the books went beyond contemporary community standards, or appealed to prurient interest, or were utterly without redeeming social importance. This Court has held that where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall,* 357 U.S. 513, 526. See also, *Freedman v. Maryland,* 380 U.S. 51; *New York Times Co. v. Sullivan,* 376 U.S. 254, 271, 277-280, 283-288.

Moreover, this Court has held that where a charge made by a State is totally devoid of evidentiary support, a judgment imposing sanctions is clearly unconstitutional under the Due Process Clause of the Fourteenth Amendment. *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Taylor v. Louisiana,* 370 U.S. 154.

Thus, the state obscenity statutes, as construed and applied to the books herein, do violence to both the free speech and press and due process provisions of the First and Fourteenth Amendments.

A judgment directing the suppression and burning of books as obscene which is based upon a record barren of any evidence to support the essential elements of the charge of obscenity and in which the State has deliberately refrained from presenting any proof in support of the charge made clearly deprives the books and the booksellers of liberty and property without due process of law, abridges the exercise of freedoms of speech and press and arbitrarily and capriciously deprives the petitioner Books and their owners of any semblance of a fair trial or even the appearance of justice. A state obscenity statute so construed and applied merely permits courts and triers of fact to sit as censors of material personally distasteful to them. Suppression without proof by the State, and without evidence in the record of the elements of the charge made, undermines virtually all the guarantees of the Bill of Rights. *Tot v. United States,* 319 U.S. 463; *New York Times Co. v. Sullivan,* 376 U.S. 254; *United States v. Romano,* 382 U.S. 136; *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965).[1]

4. Not only does the undisputed record establish that the books herein involved are not obscene and therefore entitled to constitutional protection, and not only was there a due process failure on the part of the State to prove the charge and an absence of the evi-

---

[1]A similar issue is presented in *Aday, et al. v. United States,* October Term, 1966, No. 149; and *Books, Inc. v. United States,* October Term, 1966, No. 323, pending before this Court.

dence to support the charge, but a third infirmity in this proceedings is the fact that a jury trial was denied on the issue of obscenity.[2]

A State cannot restrict the dissemination of books which are not obscene. A State is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. *Marcus v. Search Warrants of Property,* 367 U.S. 717; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478. The Fourteenth Amendment requires that regulations of obscenity by the State conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by "a dim and uncertain line." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66. See also, *Speiser v. Randall,* 357 U.S. 513.

The contemporary community standards test enunciated by this Court as an essential element of the standards for judging obscenity was intended to protect writings tolerated by the community from arbitrary governmental suppression. See, *Smith v. California,* 361 U.S. 147, 171. In *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 438, Mr. Justice Brennan stated: "A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." See also, the opinion of Mr. Chief Justice

---

[2]A similar issue is presented in *Corinth Publications, Inc. v. Wesberry, et al.,* October Term, 1966, No. 227, pending before this Court.

Warren in *Times Film Corp. v. Chicago,* 365 U.S. 43, 68-69: "The inexistence of a jury to determine contemporary standards is a vital flaw." See also, the concurring opinion of Mr. Justice Douglas in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 72; and the dissenting opinion of Mr. Justice Douglas concurred in by Mr. Justice Black in *Kingsley* (354 U.S. at 477).

The framers of the Bill of Rights did not intend to adopt common law concepts with respect to freedom of expression; common law principles were in many respects "rejected by our ancestors as unsuited to their civil or political conditions". *Grosjean v. American Press Co.,* 297 U.S. 233, 249. We deal here with an issue involving freedoms of speech and press and not with common law concepts relative to jury trials which were evolved in England in the Eighteenth Century.

A statute which permits books to be suppressed and burned because they allegedly exceed the bounds of community toleration, without allowing the community through its representatives to decide whether the books exceed the limits of such community toleration, is plainly arbitrary and capricious and violative of the due process and free speech and press provisions of the Constitution.

5. Petitioners turn now to the ruling of the court below. Discussing first "the scope of our review" (R. 53), the court below held that it would not limit its ruling to determining only whether the judgment of the trial court "is supported by sufficient evidence" (R.

54). The Court insisted that it would make an "independent constitutional judgment" (R. 54).

It should be observed initially that this improvised legal principle in the case herein is directly contrary to the principle ordinarily applied by the state court below in appeals generally. Thus, the court below stated in *J. C. Nichols Co. v. Meredith,* 192 Kan. 648, 652, 391 P. 2d 136 (1964): "At the outset it should be stated we approach this case with full recognition of the fundamental and universal rule to the effect that our province is to examine the record in the light most favorable to the prevailing party below, that we are not triers of fact, and that when findings of the trial court are supported by competent substantial evidence they are binding and conclusive on appeal."

It is difficult to comprehend why a judgment of the trial court made upon an undisputed record based upon evidence, both oral and documentary, establishing that books are entitled to constitutional protection should be treated differently on appeal than ordinary litigation where free speech and press issues are not involved. *Cf., Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property,* 367 U.S. 717; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205.

Moreover, the treatment by the court below of the "independent constitutional judgment" rule enunciated by this Court in *Jacobellis* and *Memoirs* appears to turn the rule into a sword instead of a constitutional shield for the exercise of freedoms of speech and press.

It is plain from a reading of the decisions of this Court that the purpose of requiring appellate courts to make an independent judicial review of obscenity findings was to add an additional protection for the preservation of freedom of expression. The rule was promulgated to ensure that neither administrative officials nor triers of the fact, be they judges or juries, should be left to make the final effective decisions *restraining* free expression. It was intended to make certain that the standards for judging obscenity be applied in accordance with the broad protections afforded by the First and Fourteenth Amendments. *Jacobellis v. Ohio,* 378 U.S. 184; *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 114, 120 (1960).

But when an appellate court is presented with a record where the uncontroverted evidence shows that books are not obscene, that is, do not exceed contemporary community standards; do not appeal to prurient interest; and are not without social importance; and where the trier of the facts has concurred with the views of the expert who testified, and has independently found the books not to be obscene and to be entitled to constitutional protection, the action of the appellate court in disregarding such a record and deciding as a matter of alleged constitutional judgment that the books are unlawful, is both contrary to the spirit of this Court's decisions and the letter of the express guarantees of

the First and Fourteenth Amendments. *Cf., Dickinson v. United States,* 346 U.S. 389.

The court below concluded from an "independent review" that the books herein go beyond contemporary community standards and appeal to prurient interest (R. 54). There is no indication as to how the Court reached this conclusion or upon what evidence such conclusion was based, except the statement that the books were indistinguishable from those books found by the same court below to be "hard core pornography" in *State v. A Quantity of Copies of Books,* 191 Kan. 13, 379 P. 2d 254 (R. 55). However, it should be noted that between the first decision of the court below in the aforesaid case and the decision rendered in the case below, the following rulings were rendered by this Court, the implications of which appear to have been overlooked by the court below: *Jacobellis v. Ohio,* 378 U.S. 184; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205; *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Tralins v. Gerstein,* 378 U.S. 576. See also, *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413.

Thus, the court below disregarded both the uncontroverted record and the decisions of this Court granting constitutional protection to books which far exceed the books herein in the description and depiction of matters relating to sex, nudity and excretion. Moreover, the view of the court below that the books herein are "hard core pornography" appears contrary to the views of Mr. Justice Stewart in *Quantity of Copies of*

Books v. Kansas, and Mr. Justice Harlan in *Ginzburg.* Two other Justices of this Court, Mr. Justices Black and Douglas, would appear to have the view that these books are entitled to constitutional protection.

In addition, the court below concluded that the books herein are "utterly without redeeming social importance" (R. 55), again disregarding the uncontroverted record wherein the expert witness for petitioners testified that the books do have social importance, concurred in by the trial judge. The court below seemed to find in the word "redeeming" something in the nature of "serving to offset or compensate for a defect" (R. 55). This appears to reflect a weighing of social importance against prurient appeal, a procedure rejected by this Court in *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413.

Having concluded that the books herein were not entitled to constitutional protection, despite the uncontroverted record, the court below then added that if "the obscene nature of these books be deemed doubtful" (R. 56), then the doubt, instead of being resolved in favor of the books under the provisions of the First Amendment, should be resolved against the books because of their "packaging" (R. 56).

Reliance by the court below on the "pandering" decisions of this Court in *Mishkin* and *Ginzburg* appears clearly misplaced. In the first place, this case was tried before the *Mishkin* and *Ginzburg* decisions were handed down. There never was a charge of "pander-

ing" and the case was not tried on such a theory, and no proof was ever offered in support of such a theory. The petitioners here are neither the publishers nor distributors of the books, and the State stipulated that the books were purchased at petitioners' book store by officials of the State, where books and writings dealing with a variety of subjects were openly sold to the public, and that petitioners had not read the books herein, nor did the petitioners as booksellers read the vast array of printed material offered for sale in their establishment (R. 10). Thus, the books herein have been suppressed on the basis of a charge which was never made and on the basis of a theory which was never tried. See, *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196.

Moreover, the only evidence of the so-called pandering on which the Court relied upon below was the publisher's "packaging" (R. 59). Aside from the fact that suppression is thus ordered without regard to petitioners' conduct, the record is entirely barren of any proof that the covers or blurbs herein in any way go beyond what customarily appears on similar books which are today openly sold and accepted throughout the Nation.

This Court has stated that the narrow standards for judging obscenity must be applied with a scrupulous regard to the protection of expression guaranteed by the First and Fourteenth Amendments. This Court has admonished that books must not be suppressed on the

basis of subjective predilections or tastes. Emphasis has been laid on the record made before the trier of the facts. In *Jacobellis,* this Court stated: "We have viewed the film, *in the light of the record made in the trial court,* and we conclude that it is not obscene within the standards enunciated in Roth v. United States and Alberts v. California, which we reaffirm here" (378 U.S. at 196) (emphasis added). In *Jacobellis,* Chief Justice Warren stated that there must be "sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene" (378 U.S. at 202).

The ruling of the court below, it is submitted, runs contrary to the decisions of this Court and results in an abridgment of the exercise of freedoms of speech and press, the arbitrary deprivation of liberty and property without due process of law and the capricious denial of the equal protection of the laws, contrary to the provisions of the First and Fourteenth Amendments.

6. The state obscenity statutes, on their face and as construed by the court below, violate the free speech and press and due process provisions of the First and Fourteenth Amendments. The Kansas statutes interdict any book "containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons"

[G.S. 1961, Supp. 21-1102(a)]. The test to be applied in cases under the aforesaid section (a) is whether the effect of the book upon the average person in the community is to arouse "sexual desires" or "sexually improper thoughts." The book must be judged as a whole, "by the standards of common conscience of the community of the contemporary period of the violation charged" [G.S. 1961, Supp. 21-1102(b)].

Moreover, another provision of the obscenity statutes [G.S. 1961, Supp. 21-1102a] provides that any person who distributes for resale or for reading a book "so composed as to constitute a compilation . . . words, stories . . . featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations, of perversion, lust or sexual passion, or to any combination . . . thereof" shall be guilty of a violation of the law (R. 50).

A standard which calls for the suppression of books deemed "immoral" or "manifestly tending to the corruption of morals of persons" fails to provide ascertainable standards and readily sweeps within its ambit constitutionally protected material. *Holmby Productions, Inc. v. Vaughn,* 350 U.S. 870; *Musser v. Utah,* 333 U.S. 95; *Kingsley Int'l. Pictures Corp. v. Regents,* 360 U.S. 684; *Superior Films, Inc. v. Dept of Ed.* [*Commercial Pics. Corp. v. Regents*], 346 U.S. 587.

Nor, for similar reasons, is the "corruption of the morals of persons" a proper standard for safeguarding

the protection of freedoms of speech and press. ". . . [T]he proposition, however stated, is fraught with ambiguities and an assumption of doubtful validity." Lockhart and McClure, *Literature, The Law of Obscenity, and The Constitution,* 38 Minn. L. Rev. 295, 332. Moreover, and this appears crucial to the issue here, the *test* to be applied in the use of such aforesaid standards is solely the effect of arousing "sexual desires" or "sexually improper thoughts." This Court has refused to support a standard so vague and ambiguous as to permit the suppression of material because it allegedly arouses "sexual desires." *Times Film Corp. v. Chicago,* 355 U.S. 35.

Moreover, a standard for judging obscenity dependent upon a "compilation of words" and effecting a "suggestion of illicit sex" or "sexual relations," and like language, is so patently vague and ambiguous and lacking in ascertainable stndards as to do violence to the free speech and press and due process guarantees of the Constitution.

Since "standards of permissible statutory vagueness are strict in the area of free expression" (*N.A.A.C.P. v. Button,* 371 U.S. 415), the statute here which is susceptible of sweeping and improper application should not be permitted to stand, it is respectfully submitted. *Smith v. California,* 361 U.S. 147; *Dombrowski v. Pfister,* 380 U.S. 479; *Giaccio v. Pennsylvania,* 382 U.S. 399; *Baggett v. Bullitt,* 377 U.S. 360.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioners.

SAM ROSENWEIN,
Of Counsel.



APPENDIX A.

Memorandum Decision of the Honorable Tom Raum, Judge of the District Court, Sedgwick County, Kansas.

In the District Court of Sedgwick County, Kansas.

State of Kansas, Ex. Rel. Robert C. Londerholm, Attorney General, Plaintiff, vs. A Quantity of Copies of Lewd, Lascivious and Obscene Books, Titled: "Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," "Flesh Avenger." Defendants. Francis G. Vater, et al. Case No. C-3595-64.

MEMORANDUM DECISION

This action was instituted on July 24, 1964 by William M. Ferguson, then Attorney General of the State of Kansas, by the filing of an Information. By Order filed January 25, 1965, Robert C. Londerholm, present Attorney General, was substituted for William M. Ferguson as Relator in this proceeding.

By this action the plaintiff requested an Order directed to the owner of the books to appear before this Court and show cause why a warrant should not be issued to the Sheriff of Sedgwick County, Kansas directing that said prohibited books be brought before this Court for further disposition according to law.

On July 25, 1964, the Honorable Howard C. Kline, Judge of Division No. 2 of this Court, issued an Order to Show Cause in accordance with the prayer in the Information.

Francis G. Vater and Joe Rector, Jr., co-partners doing business as Rector's Book Store, have intervened.

On August 20, 1964, Judge Howard C. Kline disqualified himself as judge in this action. Pursuant to Rule No. 4 of this Court, the case was reassigned to Division No. 6.

At the pre-trial conference on November 23, 1964 held before the Honorable E. E. Sattgast, then judge of Division No. 6 of this Court, it was stipulated that:

(a) Agents or representatives of the Attorney General in the month of July, 1964, purchased from open counters or rack displays, where they were offered for sale to the general public, the eleven titles named in the Information, said titles having been filed in this proceeding as Exhibits "A" through "K", at Rector's Book Store, 133 North Broadway, Wichita, Kansas.

(b) Francis G. Vater and Joe Rector, Jr. are copartners operating Rector's Book Store, at 133 North Broadway, Wichita, Kansas, and in the course of a year's business in that store handle and offer for sale to the general public large quantities of written and printed publications of all kinds dealing with every conceivable subject; that such written and printed publications are supplied by established publishing houses and comprise daily and weekly newspapers, magazines, books and prints containing material concerning religion, philosophy, science, literature, art, and all subjects relating to ideas and graphic arts of interest to readers and students of printed words and ideas and the graphic arts; that everyone patronizing Rector's Book Store has a free choice in the purchase of the printed matter for sale at the store; that the proprietors

of Rector's Book Store have not read the eleven titles involved in this action and do not read nor presume to read as a matter of course the printed material which is offered for sale in such store.

The Order to Show Cause was heard by Judge Sattgast on December 10, 1964. No witnesses were called by plaintiff in support of his case. The only evidence introduced on behalf of plaintiff was the eleven books named in the Information.

Robert Bruce Cutler testified as an expert witness on behalf of the defense.

In addition, the following books were introduced into evidence by the defense:

Eternal Fire by Calder Willingham
City of Night by John Rechy
Tropic of Capricorn by Henry Miller
Lady Chatterley's Lover by D. H. Lawrence
Another Country by James Baldwin
Fanny Hill by John Cleland
The Carpetbaggers by Harold Robbins
Tropic of Cancer by Henry Miller
My Life and Loves by Frank Harris

Plaintiff offered no evidence in rebuttal.

Upon the death of the Honorable E. E. Sattgast, this case was reassigned to Division No. 7, pursuant to Rule No. 4 of this Court.

The Court has read each of the twenty volumes introduced into evidence, comprising a total of 6,395 pages.

In addition, the Court has examined the transcript of testimony received on December 10, 1964, and the numerous citations of law as contained in briefs submitted by the plaintiff and the defense.

A determination as to whether the subject books are obscene, and whether the requested warrant should issue, must be based upon applicable statutes of the State of Kansas, provisions of the Constitutions of the United States and the State of Kansas, and precedents established by decisions of the United States Supreme Court and the Supreme Court of the State of Kansas.

Section 21-1102 (a), Kansas Statutes Annotated, provides, in part, as follows:

> "Any person who shall . . . sell, . . . or distribute any books, . . . publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene . . . descriptions, manifestly tending to the corruption of the morals of persons, . . . shall be guilty of a misdemeanor."

Section 21-1102 (b), Kansas Statutes Annotated, provides:

> "The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering

detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

Section 21-1102a., Kansas Statutes Annotated, provides, in part, as follows:

"Any person who . . . distributes for resale or for reading . . . any book, magazine or pamphlet, so composed as to constitute a compilation of . . . words, stories . . . featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations, of perversion, lust or sexual passion, or to any combination thereof, shall be guilty of a violation of section 1 (21-1102) of this act. . . . ."

Section 21-1102c., Kansas Statutes Annotated, provides procedure for issuance of search warrants, seizure and destruction of items found to be in violation of the provisions of this act.

The First Amendment to the Constitution of the United States provides, in part, as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."